The appellant now argues that as the tenant had for many months been paying to the landlord $60/- per month when the rent should only have been $35/- he had in effect paid a considerable amount of rent in advance so that no rent was in arrear for the month of December as alleged in the plaint. Indeed, at that time the landlord was indebted to the tenant on rent account.

The respondent objected, in the first place, that this was an entirely new point which was not raised at the trial and was, therefore, not open to the appellant on the appeal. I do not think, however, that this is a valid objection though it might affect the question of costs. The facts upon which this point depends were before the learned President, and in my opinion he ought to have considered it, especially as both parties were unrepresented before him. In any event, the point is open upon review if not on appeal.

The substantial argument put forward on behalf of the respondent is that no rent for the month of December either at the lawful rent or any other rent was ever in fact tendered and, therefore, the rent for that month was in arrear notwithstanding that the plaintiff had received more rent than she should have done in respect of other months. It was urged that although sub-section (4) of section 3 of the Control of Rent Ordinance states that a tenant who has paid too much rent to his landlord may recover the excess, that sub-section does not go on to say that he may set off that excess against any rent due and payable. The language of this sub-section was contrasted with the language of section 14 of the English Rent Restriction Act, 1920, which specifically provides that the tenant may deduct from any rent payable to him by the landlord any sum which under the Act is recoverable by a tenant from the landlord or payable or repayable by a landlord to a tenant. It was argued, therefore, that the excess paid by the tenant could not be set off against rent as it accrued.

The English Rent Restriction Act, 1920, was not the first English Act dealing with this subject and at the time when that act was passed there had been many decisions of the Courts on the earlier Acts, to which the wording of later Acts may have been directed. Not only are there differences between the general scheme of the Control of Rent Ordinance and the English Rent Restriction Acts but also doubts have been expressed as to whether some of the more technical considerations affecting the question of rent in England apply to monthly tenancies in this country. I am, therefore, not prepared to draw any conclusion from the difference of wording to which my attention has been directed in this case.

Apart from the provisions of sub-section (4) of section 3 of the Ordinance it might have been said that the unnecessary payment of the excess over $35/- per month by the tenant to the landlord was a payment made under a mistake of law which could not be recovered. But the Ordinance clearly takes this matter out of the common law rule (if, indeed, it would apply in this particular instance) and as all the excess rent paid is recoverable by the tenant I find it very difficult to see why it cannot be set-off against other rent falling due. The landlord had clearly received, on rent account, a considerable sum of money over and above the rent due and until this excess had been reduced by non-payment of a sufficient number of months rent to balance it I find it very difficult to see how it could be said that any rent was in arrear. I express no opinion as to what would be the position if the money had been received by the landlord on some other account, but this money was clearly received and accepted by the landlord as rent.

For these reasons I am of opinion that upon the facts which were before the learned President he should have held that rent at a lawful rate had not been in arrear and that the proviso to section 12 of the Control of Rent Ordinance, 1948 did not, therefore, apply and he should have dismissed the plaintiff's claim.

The result is that the appeal is allowed and the order of the learned President is set aside.

Appeal allowed — Order set aside.

In re SIN TECK HONG OIL MILLS LIMITED.

[Orig. Civ. Juris. (Taylor, J.) August 1, 1950]

[K. L. — Companies Winding-Up No. 1 of 1950]

Companies Ordinance, 1940, rule 8(2) — Voluntary winding-up — Procedure — Confirmation of nomination of liquidator.

A Summons-in-Chambers cannot issue except in a pending cause or matter.

Applications to the Court in voluntary winding-up cannot proceed by the continuous file method under rule 8 (2) of the Winding-Up Rules; the ordinary procedure is by Originating Summons.

In a creditor's voluntary winding-up the Court has no power to confirm the nomination of a liquidator by the company so as to make it effective as regards creditors.

APPLICATION to confirm the appointment of a liquidator.

E. D. Shearn and *D. G. Rawson* for the applicant.

M. Edgar (for *M. N. Cumarasami*) for the first respondent.

M. Edgar for the second, third and fourth respondents.

G. H. Summerfield (Official Receiver) in person.

The facts sufficiently appear from the judgment.

Taylor, J. : — This was an application to confirm the appointment of a liquidator.

The company had only seven or eight shareholders. They sold their principal asset to another company, apparently for cash; they held a meeting and resolved to go into liquidation. They estimated that after paying all the company's debts there would a substantial surplus for distribution to shareholders. One of the directors was appointed liquidator. He rejected a claim and the creditor applied to the Court, by Originating Summons, to reverse his decision. The liquidator instituted several suits against debtors to the company. While these proceedings were pending it was pointed out that the directors had never delivered to the Registrar of Companies a declaration of solvency under Section 223 of the Companies Ordinance. On this ground the validity of the liquidator's actions was challenged and all these proceedings in Court were, at least temporarily, deadlocked.

The liquidator then applied to the Court to confirm his appointment.

Apart from the deadlock, the affidavit in support of the application disclosed several matters which called for investigation and the procedure seemed to be incorrect. An adjournment was necessary in any event because one of the respondents had not been served. I therefore decided to refer the case to the Official Receiver. Counsel for the liquidator objected to this on the ground that the liquidator had not been heard but in substance he had been heard. I acted on his own affidavit and on that alone. Also, the Official Receiver is an officer of the Court and as such he can be consulted at any time; no one has any technical right to oppose such consultation. As a direct result of the Official Receiver's investigation security was given for the claims of all the disclosed creditors. This solved the principal difficulties and the Court and, in my opinion, all concerned, especially the creditors, owe a debt of gratitude to the Official Receiver for his prompt and effective aid. He also suggested that a Supervision Order should be made; this could still be done if anyone filed a petition but it may not be necessary.

When the liquidator's application came on for hearing some of the shareholders supported it but others opposed.

The first question is one of procedure which may affect future cases. The application was made by summons and was intituled "In the High Court — Companies Winding-up No. 1 of 1950." This suggests that winding-up by the Court is contemplated which is directly contrary to the fact. The whole object of the applicant is to forestall and prevent, if he can, a winding-up by the Court. At the first hearing his counsel, Mr. Shearn, said that it was an Originating Summons and I granted leave to amend it accordingly but after consideration he withdrew this submission and argued that it was a summons in chambers but nevertheless an originating process authorised by the Winding-up Rules, especially Rule 1.

It ought not to be necessary to state the elementary proposition that a Summons in Chambers can only be used in a pending cause or matter. Any other summons is an Originating Summons. Rule 1 expressly provides that those of the Winding-up Rules which from their nature and subject matter are applicable only to winding-up by the Courts shall not apply to a voluntary winding-up. This clearly excludes any possibility that the rules could, by implication, introduce any departure or new principle of procedure. The "chain" system of filing proceedings, prescribed by Rule 8 *et seq,* (which is merely the older Bankruptcy procedure, slightly modified) is manifestly one of the provisions which is inapplicable in voluntary winding-up. The creditor's application for admission of his proof was therefore correctly framed as an Originating Summons. The liquidator's application for confirmation was in reality an originating summons and should have been so intituled. However, as the facts were before the Court and the parties were ready, the hearing on the merits proceeded, subject to amendment of the process later, if necessary.

The liquidator had filed a very long but extremely unsatisfactory affidavit; the aim, apparently, was to shew that the company is solvent, not only as regards creditors but as regards shareholders also. The particulars given wholly failed to establish the latter point and left room for doubt as to the former but this doubt was removed during the adjournment by the giving of security.

The main arguments for the applicant were that the resolution was valid, that the company was legally in voluntary winding-up but that the validity of his appointment as liquidator had been questioned and he

therefore sought confirmation of his appointment by the Court. He referred to a footnote (b) on page 761 of the second edition of *Halsbury's* Laws of England, Volume V, which reads :—

"It is thought that where, through an oversight, a meeting of creditors has not been summoned, an application should be made to the Court for the confirmation of the appointment of a liquidator appointed by the company, and orders have been made on such application."

Now the scheme of the ordinance is perfectly clear. It provides several forms of winding-up to suit different circumstances. On occasion it is desirable to liquidate a flourishing company for the purpose *e.g.* of amalgamation; in such a case the creditors are amply covered; there is no need for supervision and the object is to minimise the delay and expense of liquidation; this is a member's voluntary winding-up and it is a pre-requisite that a declaration of solvency be filed before any resolution is passed by the shareholders. The second case is that of a company probably, but not certainly, solvent so that the directors cannot conscientiously make the declaration; here some safeguard of creditors' interests is needed and therefore a meeting of creditors must be called immediately after the meeting of shareholders, to give the creditors an opportunity to elect a liquidator. This is a creditor's voluntary winding-up.

The whole distinction depends on whether the company is or is not clearly and indubitably solvent and the requirement of the declaration of solvency is absolute. If it is omitted, or even delayed, the defect is incurable. The resolution to wind up stands but by operation of law it constitutes a creditor's voluntary winding-up, section 223 (3). The law is perfectly clear. There is no possible hardship to anyone. The directors have a free choice. If, after a proper investigation of the accounts they are satisfied as to solvency they are unfettered; if they feel any doubt they have only to call a meeting of creditors; the creditors can then appoint the same, or an additional, or a different liquidator. No application to the Court is ordinarily needed. The extra trouble and expense are negligible. But the directors must do one thing or the other. There is no section which contemplates validating the appointment of a liquidator where no meeting of the creditors has been held as required by law and to do so would whittle away the safeguard which the statute so plainly seeks to provide. I do not doubt for a moment the accuracy of the statement made by the learned editors of the Hailsham edition but the Court cannot derive powers from a footnote. The words "it is thought" are tentative and no case under the present law is cited. Clearly, the orders referred to were made in unreported, and probably uncontested, cases. In any event this applicant is not within the scope of the note. His omission to call a meeting of the creditors was not a mere inadvertence.

In my opinion this footnote is easily explained. Under the earlier Acts the Court had power, in certain circumstances, to confirm the appointment of a liquidator and such a procedure might easily be repeated after the substantive law had been altered. There is now no power to confirm in such circumstances but the Court has other powers and in a proper case an effective order could be made, even though the application was not so worded as to conform accurately to the new law.

This application fails because there is no power to make the order sought.

Moreover, in the absence of any express statutory provision it is difficult to see what effect the proposed order would have. It certainly would not bind the creditors who are not parties to the summons; who have never met or seen any accounts and some of whom object to the present liquidator.

Of the seven shareholders, three oppose the application.

This liquidator is not an uneducated person. Either he proceeded rashly without taking any advice or himself consulting the Ordinance or else he went ahead knowing that he had not complied with the Ordinance but hoping to bluster his way through. In either case he is in fact seeking to do the very thing which the Ordinance is designed to prevent.

Counsel for the applicant argued that whatever else may have been done or omitted the resolution passed by the shareholders is valid and effective so that the company is legally in liquidation and the applicant is legally the liquidator. If this were correct and complete he would not need confirmation.

A possible view is that though the resolution to wind up is valid, the nomination of the liquidator is invalid, so that the company is in liquidation but there is at present no liquidator. Anyone (including the applicant) who holds that view can apply to the Court to fill the vacancy.

Other views are possible and the Ordinance provides several other remedies, in addition to those already mentioned. As no argument was addressed to me on those points I express no opinion as to which view is the more likely to be correct. I wish only to remind the parties, and especially the applicant, that the privileges of limited liability are granted subject to proper compliance with the Ordinance. The Court

will not allow creditors or shareholders to be harassed, nor itself to be congested, by improper proceedings.

The points to be decided on this summons are whether the procedure is in order and whether the appointment of the applicant as liquidator ought to be confirmed.

The procedure was misconceived. There is no winding-up by or in the Court and no pending proceeding in which the summons in chambers could properly issue.

The application was misconceived. There is no power to confirm the appointment of a liquidator in these circumstances.

Even if there were such a power, this applicant has put himself into so false a position by ignoring the law that his appointment ought not to be confirmed.

I therefore refused the application and ordered the costs to be paid by the applicant personally, without recourse to the assets of the company until all the creditors of the company have been paid in full.

Application refused.

PUBLIC PROSECUTOR v. HO CHEONG BENG.

[App. Crim. Juris. (Abbott, J.) August 17, 1950]

[Malacca — Criminal Appeal No. 14 of 1950]

Opium and Chandu Proclamation, s. 3 — Possession — Opium found in a motor car.

This was an appeal by the Crown against the acquittal of the respondent in that, at the conclusion of the case against him in the lower Court, the learned President of the Sessions Court held that the Crown had failed to establish a prima facie case against the respondent.

Held, that according to the circumstances of this case the learned President of the Sessions Court was correct in holding that no prima facie evidence of possession was made out against the respondent.

CRIMINAL APPEAL from the Sessions Court, Malacca.

Hugh Shepherd (D.P.P.) for the appellant.

R. H. V. Rintoul for the respondent.

Abbott, J. : — This is an appeal by the Crown against the acquittal of the respondent in that, at the conclusion of the case against him in the lower Court, the learned President of the Sessions Court held that the Crown had failed to establish a *prima facie* case against the respondent.

The facts may shortly be summarised as follows. The respondent, at the material time, owned a motor car. On the day in question he was seen in that motor car being driven by another person in the direction of Alor Gajah. At Alor Gajah he descended from the car and it was driven by the other person, out of sight, into a side road. Customs officers searched the car and found, in the boot, a cement bag containing, hidden in the cement, a quantity of opium. The driver of the motor car had voluntarily unlocked the boot in order to facilitate the search. The Crown has submitted that, in law, the respondent was in possession of the opium by reason of the fact that he was using his own car, and in control, of it, throughout the material time.

Section 3 of the Opium and Chandu Proclamation makes the possession of opium an offence and assumes guilty possession on the part of the occupier of premises unless the occupier proves the contrary. The opium in this case was found, not in premises but, in a motor car — and there is thus no presumption, such as would shift the onus of proving innocent possession, that the respondent was in possession of the opium.

This Court is of opinion that the learned President of the Sessions Court was correct in holding that no *prima facie* evidence of possession was made out against the respondent.

The consideration of section 18 of the Opium and Chandu Proclamation does not therefore arise and this appeal must be, and is, dismissed.

Appeal dismissed.

WAGNER AND ANOR. v. SINGAM.

[App. Civ. Juris. (Taylor, J.) June 29, 1950]

[K. L. — Civil Appeal No. 5 of 1950]

Landlord and tenant — Control of Rent Ordinance, 1948, s. 13(i) — Tenant or any member of his family — Meaning of.

This was an appeal from an order of the Rent Assessment Board for Kuala Lumpur refusing an application by the landlords, who are trustees, for permission to apply to Court for ejectment of their tenant.

The facts are, briefly, that the tenant is a bachelor, employed by the Government, who have allotted to him official quarters in which he in fact resides, together with two "relatives" and four pupils; his married sister, with her husband and children, and also his mother, reside in the house rented from the landlords and the tenant frequently takes meals there.

Held, that for the purpose of the Control of Rent Ordinance, 1948, the family of a tenant is restricted to specified near relations. The respondent's sister and her children are not his family; they are the entirely separate family of his brother-in-law. The respondent's family, within the statute, consists of two persons only, his mother and himself and therefore the Board misdirected themselves on a point of law and that section 13(i) refers to alternative accommodation for the tenant.